

***United States Court of Appeals
for the Second Circuit***



**BRIEF FOR
APPELLEE**

76-2147

To be submitted

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 76-2147

VINCENT PACELLI,

Petitioner-Appellant,

—v.—

UNITED STATES OF AMERICA,

Respondent-Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR THE UNITED STATES OF AMERICA

ROBERT B. FISKE, JR.,
*United States Attorney for the
Southern District of New York,
Attorney for the United States
of America.*

RONALD L. GARNETT,
ROBERT J. JOSSEN,

*Assistant United States Attorneys,
Of Counsel.*

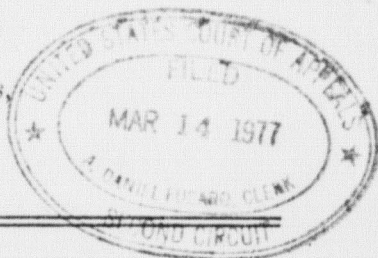


TABLE OF CONTENTS

	PAGE
Preliminary Statement	1
Statement of Facts	3
1. The Armone Trial	3
2. The Kahn Trial	4
3. Government Witness Charles Hedges	5
4. The Present Petition	5
ARGUMENT:	
The District Court Properly Denied the Motion	7
A. Allegations of Perjury Committed by Hedges and Dugan	7
B. Allegations of Suppression of Evidence ...	12
C. No Hearing on Pacelli's Petition was Re- quired	15
CONCLUSION	18

TABLE OF CASES

<i>Armone v. United States</i> , Dkt. No. 34615 (2d Cir. April 15, 1971)	10
<i>Bishop v. United States</i> , 223 F.2d 582 (D.C. Cir. 1955), <i>vacated and remanded on other grounds</i> , 350 U.S. 961 (1956)	10
<i>Brach v. United States</i> , 542 F.2d 4, 8 (2d Cir. 1976)	11, 15, 17
<i>Dalli v. United States</i> , 491 F.2d 758 (2d Cir. 1974) ..	9, 15

	PAGE
<i>Geders v. United States</i> , 425 U.S. 80 (1976)	14
<i>Hoffa v. United States</i> , 339 F. Supp. 388 (E.D. Tenn. 1972), <i>aff'd</i> , 471 F.2d 391 (6th Cir.), <i>cert. denied</i> , 414 U.S. 880 (1973)	8, 9, 11, 15
<i>Machibroda v. United States</i> , 368 U.S. 487 (1962)	17
<i>McBride v. United States</i> , 446 F.2d 229 (10th Cir. 1971)	8
<i>Romano v. United States</i> , 460 F.2d 1198 (2d Cir.), <i>cert. denied</i> , 409 U.S. 915 (1972)	15
<i>Sanders v. United States</i> , 373 U.S. 1 (1963)	17
<i>Seiller v. United States</i> , 544 F.2d 554 (2d Cir. 1975)	10
<i>United States v. Agurs</i> , — U.S. —, 44 U.S.L.W. 5013 (June 24, 1976)	6, 16, 17
<i>United States v. Armone</i> , 363 F.2d 285 (2d Cir.), <i>cert. denied</i> , 385 U.S. 957 (1966)	2, 3, 4
<i>United States v. Cianchetti</i> , 315 F.2d 584 (2d Cir. 1963)	5
<i>United States v. Costello</i> , 255 F.2d 876 (2d Cir.), <i>cert. denied</i> , 357 U.S. 937 (1958)	12
<i>United States v. Dansby</i> , 291 F. Supp. 790 (S.D.N.Y. 1968), <i>aff'd mem.</i> , Dkt. No. 33014 (2d Cir. 1969)	8
<i>United States v. Franzese</i> , 525 F.2d 27 (2d Cir. 1975)	9, 11, 15, 16, 17
<i>United States v. Gonzalez</i> , 33 F.R.D. 280 (S.D.N.Y. 1960) (Kaufman, D.J.), <i>aff'd</i> , 321 F.2d 638 (2d Cir. 1963)	8, 11
<i>United States v. Guanti</i> , 421 F.2d 792 (2d Cir.), <i>cert. denied</i> , 400 U.S. 832 (1970)	2

	PAGE
<i>United States v. Kahn</i> , 366 F.2d 259 (2d Cir.), cert. denied, 385 U.S. 948 (1966)	3, 4, 13
<i>United States v. Pacelli</i> , 521 F.2d 135 (2d Cir. 1975), cert. denied, 424 U.S. 911 (1976)	12, 15
<i>United States v. Romano</i> , 516 F.2d 768 (2d Cir. 1975)	6
<i>United States v. Rosner</i> , 516 F.2d 269 (2d Cir. 1975), cert. denied, 44 U.S.L.W. 3756 (June 30, 1976), rehearing denied, 45 U.S.L.W. 3401 (Nov. 29, 1976)	15
<i>United States v. Seijo</i> , 514 F.2d 1357 (2d Cir. 1975)	16
<i>United States v. Slutsky</i> , 514 F.2d 1222 (2d Cir. 1975)	15
<i>United States v. Stofsky</i> , 527 F.2d 237 (2d Cir. 1975), cert. denied, — U.S. —, 45 U.S.L.W. 3249 (October 4, 1976)	16
<i>Williams v. United States</i> , 481 F.2d 339 (2d Cir.), cert. denied, 414 U.S. 1010 (1973)	6
<i>Wojtowicz v. United States</i> , Dkt. No. 76-2106, slip op. 1905 (2d Cir., Feb. 22, 1977)	14

**United States Court of Appeals
FOR THE SECOND CIRCUIT**

Docket No. 76-2147

VINCENT PACELLI,
Petitioner-Appellant.

—v.—

UNITED STATES OF AMERICA,
Respondent-Appellee.

BRIEF FOR THE UNITED STATES OF AMERICA

Preliminary Statement

Vincent Pacelli appeals from an order entered in the United States District Court for the Southern District of New York, on September 8, 1976, by the Honorable Dudley B. Bonsal, United States District Judge, denying without a hearing his motion, pursuant to Title 28, United States Code, Section 2255, to vacate his judgment of conviction and the eighteen-year sentence imposed thereon on July 29, 1965.

Indictment 64 Cr. 828, filed on September 30, 1964, charged petitioner Vincent Pacelli and eleven others, together with sixteen unindicted co-conspirators, with conspiracy to violate the federal narcotic laws, Title 21, United States Code, Sections 173 and 174.

Trial on the indictment commenced on May 3, 1965, before Judge Bonsal and a jury, and concluded on June

22, 1965,* when the jury convicted petitioner and three other defendants. **

On July 29, 1965, Judge Bonsal sentenced Pacelli to eighteen years imprisonment and imposed a \$20,000 fine. His conviction thereafter was affirmed by this Court. *United States v. Armone*, 363 F.2d 385 (2d Cir.), *cert. denied*, 385 U.S. 957 (1966).

Indictment 65 Cr. 999 was filed on November 8, 1965, and, *inter alia*, charged Pacelli in three counts with obstruction of justice and subornation of perjury, and conspiracy to do so, in violation respectively of Title 18, United States Code, Sections 1503 and 371. These charges arose from Pacelli's attempt to influence the testimony of a Government witness, Charles Hedges, in the *Armone* trial.

Following the declaration of a mistrial, a second trial on this indictment commenced in February, 1966, before the Honorable Edward C. McLean and a jury,*** and concluded on March 9, 1966, when Pacelli was convicted on two counts.

* This trial hereinafter will be referred to as the "*Armone* trial."

** Two defendants at this trial were acquitted. The remaining defendants were fugitives and were subsequently tried and convicted in March, 1969 before the Honorable Lloyd F. MacMahon and a jury. This trial hereinafter will be referred to as the "*Romano* trial." The judgments of conviction in *Romano* were affirmed on appeal by this Court. *United States v. Guanti*, 421 F.2d 792 (2d Cir.), *cert. denied*, 400 U.S. 832 (1970).

*** This trial hereinafter will be referred to as the "*Kahn* trial." Pacelli was in custody during this trial, serving the sentence imposed in the *Armone* case.

On March 30, 1966, Judge McLean sentenced Pacelli to concurrent terms of two years imprisonment on each count, to run consecutive to the term to which he had been sentenced in *Armone*. This conviction was later affirmed by a unanimous panel of this Court. *United States v. Kahn*, 366 F.2d 259 (2d Cir.), *cert. denied*, 385 U.S. 948 (1966).

Pacelli is presently serving the sentences imposed upon him in *Armone* and *Kahn*.

On July 24, 1975 Pacelli filed a petition, *pro se*, pursuant to Title 28, United States Code, Section 2255, seeking an order vacating his conviction and sentence in *Armone*. By order entered September 8, 1976, Judge Bonsal denied this petition, without a hearing, on the ground that it was without merit and void of support in the trial record or in the affidavits submitted to the Court.

Statement of Facts

1. The *Armone* Trial

For a full statement of the facts in the *Armone* case, the Government respectfully refers the Court to the panel's opinion in *United States v. Armone*, *supra*, 363 F.2d at 390-91, and to the Government's brief in that appeal at pp. 5-32 (Docket No. 30135).

In sum, the evidence at the *Armone* trial demonstrated that Pacelli, with other co-defendants and co-conspirators, participated in a single conspiracy from 1956 to 1960 to import huge quantities of heroin from France and to distribute these narcotics after importation to the United States. The conspiracy was structured vertically and involved French exporters and American-based importers and distributors, linked by a network of couriers.

The nature of the conspiracy and the roles of the various defendants and co-conspirators were summarized in *United States v. Arnone, supra*, 363 F.2d at 390-91 as follows:

"The drugs originated in France, and would be smuggled into this country with the aid of couriers, who usually travelled as part of their occupations. . . .

The couriers initially delivered the drugs, once in this country, to Joseph Cahill, whose base of operations was New York City; eventually Charles Hedges and Nicholas Calamaris took Cahill's role. Joseph Arnone, one of the importers, would direct the eventual sale of the drugs to domestic wholesalers Vincent Pacelli and Michael Ricucci. Stephen Grammauta and Arnold Romano were also importers. Nicholas Viscardi acted as a storer of the narcotics pending delivery to wholesalers."

2. The Kahn Trial

For a full statement of the facts in the *Kahn* case, the Government respectfully refers the Court to the panel's opinion in *United States v. Kahn, supra*, 366 F.2d at 261-62.

Briefly stated, the Government's proof in *Kahn* showed the existence of a conspiracy to obstruct justice between Pacelli, Frances Kahn—the attorney for witness Charles Hedges—and Kahn's legal secretary, Israel Schwartzberg. The object of the conspiracy was to prevent Hedges from testifying against Pacelli, in connection with the latter's narcotics dealings, by means of bribes and veiled threats. Pacelli's overtures were communicated to Hedges, in part, during Kahn's visits to her client while he was incarcerated in the Westchester County Jail.*

* Kahn's conversations with Hedges in jail were recorded with Hedges' consent. The tapes of these conversations are hereinafter referred to as the "Hedges-Kahn tapes."

3. Government Witness Charles Hedges

Charles Hedges, a participant in the drug conspiracy charged in the *Armone* case, testified as a Government witness at each of the *Armone*, *Kahn* and *Romano* trials. Hedges was a key witness against Pacelli.

Prior to his cooperation with the Government, Hedges had been convicted of narcotics violations following a trial before then District Judge Timbers and a jury in March, 1961. In the course of this trial Hedges testified in his own defense and, as he later admitted during his testimony in *Armone*, committed perjury.

Following his conviction before Judge Timbers, Hedges was sentenced to a term of imprisonment of 15 years. On appeal Hedges' conviction was affirmed, although the convictions of his co-defendants were reversed. *United States v. Cianchetti*, 315 F.2d 584 (2d Cir. 1963). Shortly thereafter, Judge Timbers granted Hedges' motion pursuant to Fed. R. Crim. P. 35 and reduced his sentence to 5 years imprisonment. This motion was filed at the suggestion of the District Court.

4. The Present Petition

In his motion under 28 U.S.C. § 2255, Pacelli alleged numerous instances of purported perjury at the *Armone* trial by two Government witnesses, Hedges and Agent Thomas Dugan of the former Federal Bureau of Narcotics and Dangerous Drugs, and suppression by the prosecution of evidence arguably exculpatory to petitioner. In response thereto, the Government submitted the affidavit of an Assistant United States Attorney who reviewed the transcripts of the three trials discussed above and which pointed to refutations of Pacelli's arguments in the records and files of the Court. To avoid repetition, the

Government summarizes Pacelli's claims in detail, together with the factual background pertinent to each claim, in the Argument section of this Brief.

In a Memorandum-Order, entered on September 8, 1976 (App. 70-73),* Judge Bonsal, who presided over Pacelli's trial in the *Armone* case, rejected Pacelli's contentions, both as to the purported perjury and the alleged suppression of evidence. After specifically reviewing petitioner's two principal claims, the District Court concluded:

"In reviewing petitioner's other contentions concerning subornation of perjury by Agent Dugan and Hedges, the Court finds petitioner's allegations are either contradicted or not supported by the record. Furthermore, petitioner's contentions as to the suppression of evidence, even if taken as true, do not appear to meet the standard of constitutional error as recently enunciated in *United States v. Agurs*, — U.S. —, 44 U.S.L.W. 5013 (June 24, 1976).

Since petitioner's motion is without merit and is void of support in the trial record or in the affidavits submitted to the Court, the motion is denied without a hearing. 28 U.S.C. § 2255; see *United States v. Romano*, 516 F.2d 768, 771 (2d Cir. 1975); *Williams v. United States*, 481 F.2d 339, 345 (2d Cir.), cert. denied, 414 U.S. 1010 (1973)." (App. 72-73).

* References to Petitioner's Appendix are cited as "App.". References to transcript of the various trials are cited as "Tr." preceded by the case name.

ARGUMENT

The District Court Properly Denied the Motion.

Pacelli's motion alleged several instances of claimed perjury by Government witnesses and suppression of evidence crucial to the defense case, all of which purportedly undermined his conviction in *Armone*. Judge Bonsal properly concluded that these claims were frivolous.

A. Allegations of Perjury Committed by Hedges and Dugan

Pacelli's basic contention in the District Court was that the Government knowingly used perjurious testimony to secure his conviction. In alleged support of this claim, Pacelli pointed to various portions of the testimony of Charles Hedges, an accomplice who testified against him at trial, and to the testimony of Agent Thomas Dugan. By misquotation, miscitation, and extraction out of context from the record, Pacelli claimed that Dugan falsely testified that no tape recordings of statements by Hedges had been made, when in fact recordings of conversations between Kahn and Hedges existed, and, that he had not advised Hedges to seek a sentence reduction. Similarly, Pacelli averred that Hedges committed perjury (i) in denying that he expected help from the Government in getting his sentence reduced; (ii) in denying that he expected to receive money and other assistance from the Government; and, (iii) in his explanation of the source of \$1500 found on his person at the time of his arrest.

A cursory reading of the *Armone* record, together with petitioner's bald allegations, make clear that Pacelli has not satisfied his burden on a section 2255 motion to demonstrate that the alleged perjurious testimony was

in fact false, that it was material to his conviction or that it was instigated by the Government or committed with its knowledge. *Hoffa v. United States*, 339 F. Supp. 388, 392-93 (E.D. Tenn. 1972), *aff'd*, 471 F.2d 391 (6th Cir.), *cert. denied*, 414 U.S. 880 (1973). See also, *McBride v. United States*, 446 F.2d 229 (10th Cir. 1971); *United States v. Dansby*, 291 F. Supp. 790, 793 (S.D.N.Y. 1968), *aff'd mem.*, Dkt. No. 33014 (2d Cir., September 12, 1969); *United States v. Gonzalez*, 33 F.R.D. 280 (S.D.N.Y. 1960) (Kaufman, D.J.), *aff'd*, 321 F.2d 638 (2d Cir. 1963).

With respect to Dugan's testimony about tape recordings it is manifest that no perjury was committed. The questions posed to him were specifically narrowed by the Court to refer solely to statements made by Hedges to Government agents and which constituted admissions or facts involved in the *Armone* trial then in progress. (A. 15-16). Fairly read in context, these questions could not have been construed as seeking a response about the recorded prison conversations between Kahn and Hedges in which the former had conveyed to Hedges Pacelli's offer to influence or block his testimony.*

Similarly unsubstantiated is Pacelli's claim that Dugan lied about the matter of Hedges' sentence reduction. A review of the *Kahn* record makes clear that Hedges' sentence reduction came about as a result of Judge Tim-

* Indeed, it is clear that, given the trial court's prior ruling about the Hedges-Kahn tapes, no inquiry into this matter would have been permitted, and defense counsel, by their own tactical acknowledgment, would not have sought to elicit testimony about these highly incriminating tape recordings. See, *infra*, at 13 n*. Moreover, if the trial judge had believed that Dugan's testimony was even facilely misleading he surely would have sought to clarify the matter during the *Armone* trial, since the court had been made aware of the Hedges-Kahn tapes.

bers' initiative, founded upon his concern that Hedges' sentence was unfair in view of the reversal of the convictions of his co-defendants. (A. 22-24).^{*} Pacelli's bold-faced claim that the sentence reduction was brought about by Dugan's intervention with Judge Timbers (App. 8) is no more than fanciful imagination and outrageous inuendo which, without more, merited clear and simple rejection, as Judge Bonsal in effect concluded. (App. 72). *United States v. Franzese*, 525 F.2d 27, 31 (2d Cir. 1975); *Dalli v. United States*, 491 F.2d 758, 760-61 (2d Cir. 1974); *Hoffa v. United States*, *supra*, 339 F. Supp. at 393.

Pacelli's distortion of the matter of Hedges' sentence reduction equally belied his allegation that Hedges falsely testified as to his expectations for assistance from the Government in obtaining a reduced sentence. Pacelli's claim in this regard was framed solely upon the testimony of James Godwin, Hedges' cousin, who appeared as a defense witness in the *Romano* trial. In *Romano*, Godwin claimed that he had been told by Hedges that the latter was promised a substantial reduction in sentence in return for his cooperation with the Government. This testimony, apparently rejected by the jury which convicted all defendants on trial, obviously was elicited in an effort to impeach Hedges. However, given the fact that Godwin's intention was to "ruin" the Government's case

^{*} In the course of the *Kahn* trial Judge Timbers was subpoenaed as a prospective defense witness with respect to this matter. As indicated in the record, Judge McLean, who presided over the *Kahn* trial, contacted Judge Timbers and reported to counsel the substance of what would have been Judge Timbers' testimony, if called as a witness. In view of Judge Timbers' statement that the Hedges' sentence reduction was the court's initiative and Judge Timbers' being then engaged on trial in the Northern District of New York, Judge McLean quashed the defense subpoena.

in the *Romano* trial,* Godwin's allegation was surely suspect and uncorroborated.** Moreover, while this allegation is now rather ancient,*** petitioner proffered no further support for the claimed specification of perjury.

Pacelli's final claims of perjury related to Hedges' alleged receipt of financial assistance from the Government during the period of time of his cooperation and to Hedges' testimony with respect to \$1500 in cash found on his person at the time of his arrest. (App. 8-10). With respect to the former claim, Pacelli did not cite any portion of the *Armone* trial in which the alleged perjurious testimony was given. Thus, as Judge Bonsal implicitly found, there were no apparent inconsistencies in the records of the *Armone* and *Kahn* trials which supported this claim of perjury.**** Similarly, petitioner's

* See *Romano* Tr. 485, 488.

** Godwin's testimony at the *Armone* trial was itself the later subject of a section 2255 motion by defendant Armone. Armone alleged that Godwin had committed perjury during his trial also in denying promises of Government help. Armone's petition was dismissed by Judge Bonsal on January 7, 1970, and this Court affirmed from the bench. *Armone v. United States*, Dkt. No. 34615 (2d Cir., April 15, 1971).

*** With respect to this and other unsupported allegations made by Pacelli, it is noteworthy that he waited six years after Godwin's purported revelations in the *Romano* trial to seek relief on the grounds of alleged perjury by Hedges and Dugan. This fact alone underscores the lack of any substance in the petition. Cf. *Seiller v. United States*, 544 F.2d 554, 568 (2d Cir. 1975); *Bishop v. United States*, 223 F.2d 582 (D.C. Cir. 1955), vacated and remanded on other grounds, 350 U.S. 961 (1956).

**** Pacelli's claim that Hedges was receiving money from the Government at the same time as the *Armone* trial bears absolutely no support in any of the records before the court. Again, he relied upon the unsupported allegations of Godwin's testimony in *Romano*, which is patently an insufficient basis to raise any factual issue. See also, *Romano* Tr. 303.

latter claim was not accompanied by any reference to the *Armone* transcript in which the alleged inconsistent testimony was given.*

Assuming *arguendo* that such testimony by Hedges was false, Pacelli's claim still must fail since his petition was not accompanied by a scintilla of proof of the Government's awareness or complicity in any perjured testimony. Consistent with the balance of his petition, Pacelli provided mere conclusory and unsupported allegations which were plainly insufficient to state a valid claim under section 2255. *United States v. Franzese, supra*, 525 F.2d at 31; *Hoffa v. United States, supra*, 339 F. Supp. at 392-93.** Moreover, even assuming Hedges committed perjury on this collateral matter, it surely cannot be said to have contributed to petitioner's conviction in *Armone*. *United States v. Gonzalez, supra*. Given Hedges' admissions to prior perjury at his own trial and admissions of other criminal wrongdoings, this incident would have been no more than cumulative impeachment of a witness whose credibility already had been

* Pacelli claimed, without supporting reference to the transcript (App. 10), that in the *Armone* trial Hedges testified that \$1500 found at the time of his arrest had been won at a "crap" game. In the *Kahn* trial Hedges testified that he had obtained this money as the proceeds of a robbery for which he still faced possible prosecution. See *Kahn* Tr. 480.

** Although demonstration that the Government knowingly used perjurious testimony to secure the conviction of a defendant raises a due process claim which is cognizable under section 2255, a showing of simple perjury without Government awareness does not stand on the same footing. Indeed, this Court has specifically cast doubt whether such a naked claim of perjury, without more, states a claim under section 2255. *Brach v. United States*, 542 F.2d 4, 8 (2d Cir. 1976); *United States v. Franzese, supra*, 525 F.2d at 31, n.7.

extensively attacked in cross-examination on all matters for five and one-half days. See *United States v. Pacelli*, 521 F.2d 135, 137-38 (2d Cir. 1975), *cert. denied*, 424 U.S. 911 (1976). Clearly, standing alone, such perjury would not have produced an acquittal upon a retrial. See *United States v. Costello*, 255 F.2d 876 (2d Cir.), *cert. denied*, 357 U.S. 937 (1958).

B. Allegations of Suppression of Evidence

The second leg of Pacelli's motion (App. 4-6, 8, 10) listed several areas of claimed suppression of evidence by the Government, many of which are cut from the same cloth as his perjury contentions.

Pacelli's central suppression argument in the District Court was that the prosecution deliberately concealed the existence of the Hedges-Kahn prison tapes during the *Armone* trial. Since the *Armone* record made perfectly clear that this claim was patently false (*Armone* Tr. 1147-52, App. 17-20), Pacelli thereafter somewhat altered his argument and contended additionally that the trial court interfered with his right to counsel by directing defense counsel not to disclose the existence of the tapes to their clients. Again, Pacelli flagrantly distorted the content of the *Armone* record.

As Judge Bonsal noted, in the course of the *Armone* trial, the Government disclosed to the court that it had in its possession tape recordings of Kahn's approach to influence Hedges. All defense counsel were afforded an opportunity to examine this material extensively (App. 17-20). Thereafter, counsel and the court discussed, *inter alia*, the highly prejudicial nature of this material and counsel's need to advise their clients of its existence. After soliciting the views of all counsel, including those

of Robert Kasanof—petitioner's then attorney*—the matter was resolved as follows:

"The Court: I think the way I would like to leave it, gentlemen—I do recognize your problem of the attorney-client relationship—that you do say to your clients that the judge made available to you certain material dealing with Miss Kahn and that you looked at it and you felt there was nothing in this material that was important or useful to their defense and that the material itself the judge directed will be impounded and not used in connection with the trial.

If that stirs up any serious question, let me know." [*Armone* Tr. 1151].

Thus, it is plain that the Hedges-Kahn tapes were made known to Pacelli's counsel during *Armone* ** and that counsel made a sensible and deliberate determination that such materials could not effectively be used by the defense; indeed, that use of such tapes would have been devastating to any chance of acquittal. Accordingly,

* Mr. Kasanof stated, in part, the following:

"I concur and I am concerned about what may be said. I agree I certainly would not wish to make any use of this material at the trial at all. That is my judgment, that it is not in any way advantageous to the defendant to use this material, at least as it relates to the kind of impeachment. It is very liberally scattered with dates and recollection and dates and so forth. That area I at least have no disagreement with and your Honor permitted us to explore that extremely fully." (*Armone* Tr. 1148).

** Existence of the Hedges-Kahn tapes was also disclosed in both the *Kahn* and *Romano* trials. See *United States v. Kahn*, *supra*, 366 F.2d at 264; *Romano* Tr. 111-12.

Pacelli's claims of suppression and interference with the right to assistance of counsel are patently frivolous.*

Pacelli's other claims of deliberate suppression, which the District Court properly concluded were totally without merit, require only brief discussion. The claims of suppression of evidence that Hedges conditioned his cooperation upon a reduction of his sentence, that the Government knew the true source of the \$1500 found at Hedges' arrest and that the Government was aware of pending gun charges against Hedges, are utterly without support in Pacelli's motion and the record below. While allegedly premised upon inconsistent testimony in the *Armone* and *Kahn* trials, the motion again did no more than raise barebone allegations and conclusions of Government suppression in these areas. Pacelli's contention that the Government withheld information about financial and other assistance to Hedges, as well as the fact that Hedges did not implicate Pacelli until seven months after his cooperation commenced, were belied by the five and

* Petitioner's present reliance upon *Geders v. United States*, 425 U.S. 80 (1976) is totally misplaced. The trial court in *Armone* did not place defense counsel under any restriction which interfered with the effective assistance of counsel. Pacelli's counsel was expressly permitted to advise his client of the general nature of the material in the Government's possession and was invited to advise the Court if further difficulties existed. Moreover, unlike *Geders*, the matter in the tapes was totally collateral to issues on trial in *Armone*. To the extent it was otherwise, it was compelling evidence of Pacelli's consciousness of guilt. Finally, although Pacelli now speculates as to possible affirmative use which could have been made of such tapes, it is beyond cavil that such material could not have been put to any constructive use by the *Armone* defendants and that no competent trial tactician would have elected to explore the circumstances of the Hedges-Kahn material. Cf. *Wojtowicz v. United States*, Dkt. No. 76-2106, slip op. 1905 (2d Cir. February 22, 1977).

one-half days of cross-examination of Hedges with respect to his relationship and cooperation with the Government.

Moreover, even if the information Pacelli claims was withheld had not been turned over, its collective value simply could not have had a significant effect on the outcome of the trial. Hedges was not portrayed to the jury as a reformed and rehabilitated individual. During a broad and grueling cross-examination by all counsel, which lasted five and one-half days, Hedges testified to his convictions for narcotics offenses and burglary, arrests for assault, the commission of perjury both at his first trial and thereafter prior to initial sentencing by Judge Timbers, his initial refusal to cooperate with the Government, and his relationship with agent Dugan. Such additional material would have been of minimal value to the defense and would only have been cumulative with other impeachment material available to and used by Pacelli's attorney. See *United States v. Pacelli*, *supra*, 521 F.2d at 137-39; *United States v. Rosner*, 516 F.2d 269, 273-74 (2d Cir. 1975), *cert. denied*, — U.S. —, 44 U.S.L.W. 3756 (June 30, 1976); *Brach v. United States*, *supra*, 542 F.2d at 7, n.1.

C. No Hearing on Pacelli's Petition was Required

Pacelli argues that the District Court committed error in denying his motion without a hearing. In the face of moving papers which contained no more than hearsay, conclusory allegations and bland speculation, it is clear that no hearing was required. *United States v. Franzese*, *supra*; *Romano v. United States*, 516 F.2d 768, 771 (2d Cir. 1975); *United States v. Slutsky*, 514 F.2d 1222 (2d Cir. 1975); *Dalli v. United States*, *supra*; *Romano v. United States*, 460 F.2d 1198, 1199 (2d Cir.), *cert. denied*, 409 U.S. 915 (1972); *Hoffa v. United States*, *supra*.

While Judge Bonsal's memorandum did not specifically address each individual claim raised by petitioner, it is clear that the District Court gave complete consideration to Pacelli's claims and found them both factually and legally insufficient to require a hearing. This conclusion was eminently sound. As argued above, Pacelli's claims of perjury—even if taken as true—fall far short of meeting the threshold factual showing with respect to Government participation or knowledge of the perjury,* and it cannot be said that such perjury “probably would have altered [the jury's] verdict,” even if considered on the factual elements of the Government's case as well as the witness' credibility. *United States v. Stofsky*, 527 F.2d 237, 246 (2d Cir. 1975), *cert. denied*, — U.S. —, 45 U.S.L.W. 3249 (October 4, 1976). Similarly, in view of the minimal cumulative impeachment value on collateral matters of Pacelli's allegations of suppression of evidence—equally farfetched as his claims of perjury—there was no “significant chance” that such items could have affected the votes of enough jurors to avoid a conviction. *United States v. Seijo*, 514 F.2d 1357, 1364 (2d Cir. 1975). Accordingly, Judge Bonsal's conclusion that Pacelli's suppression allegations failed to amount to constitutional error under *United States v. Agurs*, — U.S.

* Indeed, the instant petition falls far short of the situation in *United States v. Franzese*. In *Franzese*, this Court affirmed denial of a section 2255 petition without a hearing where a key Government witness herself admitted in a post-trial affidavit that she had committed perjury at petitioner's trial and that the Government was specifically aware of her perjurious testimony. The Court concluded that, even taking as true the allegations in the witness' affidavit, no hearing was required since the matter referred to had been sufficiently explored at trial. While the *Franzese* Court noted that the question was “close”, *Franzese* involved a far more powerful showing in the petition than Pacelli's unsupported and factually incorrect allegations here.

—, 44 U.S.L.W. 5013 (June 24, 1976), was plainly correct.*

It bears final emphasis that Judge Bonsal—the presiding judge at the *Armone* trial—enjoyed the best possible position to assess the likely impact on Pacelli's trial of the claimed perjury and suppression of evidence. Like the district judge in *United States v. Franzese*, *supra*, Judge Bonsal “had the advantage of intimate familiarity with the case, born of many pre- and post-trial motions and a long trial where he had the opportunity to observe the witnesses.” 525 F.2d at 32 (footnotes omitted). In the present case, the District Court's exercise of its discretion to deny the petition without a hearing, given Pacelli's insubstantial claims, was clearly not abused. *Machibroda v. United States*, 368 U.S. 487, 495 (1962); *Sanders v. United States*, 373 U.S. 1, 20 (1963).

* The District Court applied the *Agurs* standard to Pacelli's suppression arguments and, in effect, concluded that the allegedly suppressed information, in the totality of the *Armone* record, would not have “create[d] a reasonable doubt that did not otherwise exist . . .” *United States v. Agurs*, *supra* — U.S. at —, 44 U.S.L.W. at 5017. We submit that under its rationale, *Agurs* properly controls this case. This Court has not yet decided the full applicability of *Agurs* in the present context. See *Brach v. United States*, *supra*, 542 F.2d at 6. It need not do so here since, as indicated above, Pacelli's claims are so patently frivolous and without merit that they do not fall within even the lesser standard for Government suppression under *Seijo*.

CONCLUSION

The order of the District Court should be affirmed.

Respectfully submitted,

ROBERT B. FISKE, JR.,
*United States Attorney for the
Southern District of New York,
Attorney for the United States
of America.*

RONALD L. GARNETT,
ROBERT J. JOSSEN,
*Assistant United States Attorneys,
Of Counsel.*

AFFIDAVIT OF MAILING

STATE OF NEW YORK)
COUNTY OF NEW YORK) ss.:

CANNELLA C. MULLINS being duly sworn,
deposes and says that she is employed in the office of
the United States Attorney for the Southern District
of New York.

That on the 14th day of March, 1977,
she served ^{2 copies} ~~a copy~~ of the within brief by placing the same
in a properly postpaid franked envelope addressed:

Vincent Pacelli
Box PMB 89010-131
Atlanta, Georgia 30315

And deponent further says that she sealed the said envelope
and placed the same in the mail box for mailing at One St.
Andrew's Plaza, Borough of Manhattan, City of New York.

Cannella C. Mullins

Sworn to before me this

14th day of March, 1977

Phyllis A. Rush

PHYLLIS A. RUSH
Notary Public, State of New York
No. 03-4635198
Qualified in Bronx County
Commission Expires March 30, 1978